the common-law liability for all damages occasioned as a reasonable consequence of its default or neglect.

I am consequently of opinion that there is no authority in the Penang Port Commission Ordinance permitting the Commission to restrict its liability for goods received into its custody and particularly it has no powers under section 66 to do so.

The claim therefore succeeds. There will be judgment for the plaintiffs in the sum of $3,442.07 and interest thereon at 6% from 3 May 1968 to judgment or payment whichever is the later. The plaintiffs will also have the costs of the action.

Judgment for the plaintiff.

Solicitors: *S. Thillainuthu & Phock Kin; Lim Huck Aik & Co.*

CHE DAH & ANOR. v. COMMISSIONER OF LAND TITLES (PENANG AND MALACCA) PENANG

[O.C.J. (Chang Min Tat J.) April 13, 1973]

[Penang — Civil Suit No. 300 of 1972]

Land Law — Land conveyed to settlor for life and thereafter to beneficiary — Conversion of land to Torrens system — Land registered in name of settlor "for life as trustee" — Death of settlor — Transfer by beneficiary — Application for registration rejected — Remedy — Appeal to the High Court — National Land Code (Penang & Malacca) Titles Act, 1963, ss. 66-69 — National Land Code, 1965, ss. 292, 298, 301, 302, 340, 417 and 418.

By a deed of gift made in 1963 one Aishah granted and conveyed a piece of land to hold the same for her daughter Che Dah in fee simple subject to her life interest. When land in Penang was converted to the Torrens Systems under the provisions of the National Land Code (Penang and Malacca Titles) Act, 1963 the name that appeared on the interim register was "Aishah binte Haji Yusoff for life as trustee". Aishah died in 1968 and in 1970 Che Dah (the first plaintiff) purported to transfer the land to the second plaintiff for valuable consideration. When the transfer was presented for registration, it was rejected on the ground that the transferor was not the registered proprietress. The plaintiffs brought an action under section 447 of the National Land Code for a declaration that the first plaintiff was the registered proprietress of the land and for an order that the transfer be registered.

Held: (1) the proper remedy for the plaintiff to pursue was to apply under section 417 of the National Land Code and the Rules of the Supreme Court to direct the Registrar to register her as the owner of the land upon her rights of a remainderman falling into possession;

(2) the action as instituted was misconceived and must be dismissed.

ACTION.

W. A. Goh (Miss) for the plaintiffs.

Abu Talib bin Othman (Legal Adviser, Penang) for the defendant.

Chang Min Tat J.: This action commenced by writ was by an order made on an application under section 447 of the National Land Code 1965 tried by motion in the writ. It concerned a piece of land and hereditaments known as Lot 140 situate in Mukim A in the South-West District of Penang.

The history of the land can be briefly stated as follows:

By a deed of conveyance date 29 October 1906, one Eusoof bin Ismail acquired the fee simple of the land in questtion subject to a mortgage. The mortgage which was made in November 1905 would appear to be outstanding but would be time-barred and nothing turns on it. Next by a deed of conveyance made on 10th March 1939 the said Eusoof bin Ismail conveyed the land to himself for life "as trustee' and thereafter to Aishah binte Haji Yusoff. Then, by a deed of gift made on 16th July 1963, in consideration of the natural love and affection which she had of her daughter, Che Dah binte Haji Sulaiman and in further consideration of the sum of $1 paid her by the said Che Dah, Aishah binte Haji Yusoff as beneficial owner, granted and conveyed, *inter alia*, the land to hold the same unto Che Dah binte Haji Sulaiman, the first applicant herein, in fee simple subject however to her life interest. It was recited therein that Eusoof bin Ismail had since died. Needless to say, all these conveyances were under the old English system of conveyancing as embodied in the Law of Property and Conveyancing Ordinance (S. S. Laws Cap. 118).

In the course of the conversion of the land system to the Torrens System under the provisions of the National Land Code (Penang and Malacca Titles) Act 1963, the name that appeared on the interim register was Aishah binte Haji Yusoff "for life as trustee".

Aishah died at the age of 70 on 16 May 1968.

By a transfer executed on 2 November 1970, the remainderman Che Dah binte Haji Sulaiman purported to convey the land to Chew Kooi Seng for valuable consideration. When presented for registration, it was rejected upon the grounds that the transferor was not the registered proprietress. More specifically, the reasons for the rejection were stated to be that the land was still registered in the name of Aishah and no action had yet been taken by the transferor to have herself registered as the proprietress of the land.

As a result, both the transferor and the transferee brought this action in court for—

1. a declaration that the transferor is the registered proprietress of the land,
2. an order that the transferor be registered in the interim register as the remainderman,
3. an order that the transfer of 2 November 1970 be registered,

and for all consequential orders and other reliefs. They regarded the refusal of the Commissioner to register the transfer as unreasonable. To anyone brought up in the old system of conveyancing, their attitude is, if I may say so with respect, not entirely unintelligible. In this previous system all that was necessary was a recital that the tenant for life had died, as in the deed of gift of 16 July 1963. The death could be ascertained by a requisition on title and after 30 years would be accepted as a fact without necessity for further proof. The death of the tenant for life meant that the fee simple passed in law and in fact to the remainderman without any or further action and the remainderman was

free and able to deal with it in any way he liked. Now, it would appear he was not and he would require an order of court vesting the property in him before he could deal with the land.

Miss W. A. Goh for the plaintiffs submitted that the rights of remaindermen were recognised in the 1963 Act, in particular by section 36 and section 37 sub-sections (a) and (b). It was her contention that such recognition must be given effect to in the new Act. Alternatively, she contended that if such recognition could not be seen to fit practically into any particular section of the Act, the Commissioner could act under section 34 which was a provision for the correction of errors.

On the other hand, Encik Abu Talib bin Othman, the Legal Adviser for Penang while conceding that the new law did not disregard the rights of remaindermen contended that the Commissioner was bound to use only the powers conferred on him under the legislation and that it would be wrong for him to do more than that. The Legal Adviser did not think that it was a case for the correction of errors. There had not been in this or in similar cases, any error for correction. In a settlement the tenant for life was the person entitled to possession or to the fruits of the settlement. Under section 47, he was for the duration of his life entitled to an estate in absolute possession and under section 50, the Commissioner was bound to register him as proprietor for life as trustee. The death of the tenant for life did not, if I may so put the submission of the Legal Adviser, turn this fact into an error calling for the application of the Commissioner's powers under section 34.

Furthermore, the Legal Adviser contended that there were clear statutory provisions for excluding from the interim register all references to trusts and for merely registering the trustees of any settlement or settlements as trustees. He pointed to Chapter 4 of Part V of the Act under the heading of "Trusts and Settlements" and in particular to section 66. Section 67 provides for the continuation of pre-existing trusts and section 68 for the case of an infant entitled to be registered as proprietor. The registration would be in the name of his parent or guardian as trustee.

The general provision for registration in the case of trusts and settlements is contained in section 69.

Factually the holding of the land in question had before the death of Aishah, the tenant for life, been registered in the interim register and all dealings subsequent thereto must be made under the provisions of the National Land Code 1965. The purported transfer used Form 14A of the Code. This was the form that was rejected. Examined closely, the matter could be seen to be concerned with one narrow issue: whether the Commissioner was right in rejecting the document in question for registration.

On this issue, it could not be said that this was a case of an error calling for a correction by the Commissioner of his own motion or on the application of the *cestui que trust*. There could be no doubt that when the interim register was compiled, Aishah was the tenant for life, living at the relevant time and was under the provision of section 69 of the 1963 Act correctly registered as "trustee for life". Any happening subsequently could not render a correct registration into an error. The intervening event might make the entry inaccurate of the new state of events, but there was no error within the meaning of section 34 calling for correction.

It therefore remains to be considered whether there is any provision for the Commissioner to accept the application for registration.

Part Eighteen of the National Land Code 1965 deals with the registration of dealings in land. The instruments capable of being registered are enumerated in section 292(1). They are:

(a) any transfer under Part Fourteen of land, of an undivided share in land, or of any lease, sub-lease or charge;

(b) any lease, sub-lease or surrender thereof under Part Fifteen;

(c) any charge, discharge or instrument of postponement under Part Sixteen;

(d) any certificate of sale under Part Sixteen, and

(e) any instrument granting or releasing any easement under Part Seventeen.

Section 301 provides that

"An instrument shall be fit for registration under this Part *if but only if* the following conditions are satisfied

(a) that it is one of the classes of instrument set out in sub-section (1) of section 292 as authorised to be so registered;

...."

The procedure for registration is laid down in Chapter 2 of this Part. The relevant section is section 298 which reads —

"298.(1) Where any instrument is not fit for registration, the registrar *shall reject it forthwith*, unless the unfitness consists solely of some formal defect or clerical error."

On a proper reading of these sections relating to registration, and on the correct stress being put on the emphatic words I have italicized, *"if and only if"* in section 301 and *"shall reject it forthwith"* in section 298(1), it will be seen that there is no discretion given to the registrar to register any instrument which is outside the scope and purview of section 292. For an officer exercising administrative functions, to adhere strictly to the law is not an uncommendable attitude to take, so long as he does not unreasonably withhold the exercise of any discretion given to him but he of course cannot exercise any discretion where none is given to him.

An examination of section 292 shows that the instruments capable of registration cover most dealings in land, particularly where there are registered proprietors or persons registered with interests to execute the instruments, or their duly appointed attorneys. Transfer by sale in a foreclosure action is evidenced by a certificate of the official conducting the sale. Transmission on death or bankruptcy is dealt with in Part Twenty-two and co-proprietorship of land involving its particular questions of tenancy in common or joint ownership in Part Twenty-one.

What would not appear to be covered is the position of the remainderman who had come into possession. As he, speaking generally, is not the registered proprietor or a person registered with an interest in the land, he could not execute any instrument that would fall into any class enumerated in section 292. For this reason Miss W. A. Goh suggested that there was a lacuna in the law. If there was, it would not appear to help her case, since no lacuna in enacted law could be filled by a judicial decision, particularly one compelling an officer to do something which the law would appear to prohibit him from doing. But, with respect, I am not at all sure that there is a lacuna. For myself, I should imagine that read as a whole, in the scheme contemplated by the Code, the "omission", if I may so call it, to provide for such a case is deliberate.

The answer lies as much in the essential difference between a beneficial owner and a registered owner as in the doctrine of indefeasibility of title by registration.

Under the old English system, the contingent interest of the remainderman became converted on the death of the tenant for life into a vested interest as beneficial owner and he could thereafter deal with the fee simple or other interest in the land as such beneficial owner. The land system under the National Land Code is based entirely on registration and even within this restricted view, it can be readily seen that no one could deal with any holding before getting himself or herself registered with an interest therein.

As for the indefeasibility of title, it is provided in section 340 of the Code that the title to the holding shall be indefeasible except in certain circumstances e.g. fraud and forgery. In the presence of such provision, it becomes of the utmost importance that any instrument transferring the proprietorship of or interest in the land should show, on the face of it, the validity of the execution by the registered proprietor as transferor or the person with a registered interest in the land.

The registrar has certain powers of enquiry under section 302 to determine the fitness of any instrument for registration under Part Eighteen, which effectively means the instruments enumerated in section 292, but even then his powers are subject to the limitations set out in section 303. In sub-section (d) it is expressly provided that —

"in the case of any dealing effected by a person or body who is registered as trustee or representative, ... he shall not be concerned to enquire whether the dealing is consistent with the trusts by which the land or interest in question is affected or contrary to any prohibition or limitation in the instrument creating the trusts."

Where as in the present case, the dealing is not by a registered proprietor as trustee but by a remainderman whose name has been kept away from the register in compliance with the provisions of keeping trusts out of the register, the Registrar does not have any powers of enquiry or investigation.

It ought to be realised that as a necessary corollary to this indefeasibility by registration, which amounts almost to a state guarantee of title, there can be no provisions for any requisition on title, or any requirement on the party purporting to deal with the land or his solicitor on the principle of liability to one's principal, to perfect the title. It is therefore understandable if the Registrar should refuse to accept for registration any instrument outside the scope of section 292.

Provision is consequently made in the Code for an appeal from any decision, including a refusal, of the Registrar. It lies in section 418. The general powers of the court or a judge are contained in section 417 which are exercisable whether on appeal or in an original application and it is there that a proper scrutiny could be made and the title of a proper claimant be declared and affirmed and perfected by subsequent registration on an order of court. This was the action to which the Deputy Commissioner of Land Titles Penang referred in his affidavit of 8 February 1973 as required to be taken by the first plaintiff to have herself registered as the proprietress of the said land. Until such registration, she could not obviously deal with the land, at least not in a way that would enable her to obtain registration of any instrument executed by her.

As I understand it, this action was taken in the form of a writ for a declaration and not by way of an appeal from the refusal of the Registrar because counsel for the plaintiffs sought a general declaration for the future guidance of the Commissioner. No objection was taken by the Legal Adviser to this form but even then, with respect, I do not see how I can accede, even if I agree with the plaintiffs, to the request.

There is of course nothing to prevent the first plaintiff from applying under section 417 of the Code and the Rules of the Supreme Court for directing the Registrar to register her as the owner of the land, upon her rights of a remainderman falling into possession, but the action as instituted is dismissed. Since this was treated by all parties very much as a test case, I think the fairest order I can make is that both parties shall bear their own costs.

Action dismissed.

Solicitors: *G. H. Goh & Co.*

WONG LAI FATT v. PUBLIC PROSECUTOR

[F.C. (Ong C.J., Ali and Ong Hock Sim F.JJ.)

April 17, 1973]

[Kuala Lumpur — Federal Court Criminal Application No. 12 of 1972]

Penal Code, ss. 100 and 302 — Murder — Plea of guilty — Right of private defence — Failure of counsel to plead exception — Criminal Procedure Code (F.M.S. Cap. 6), Ch. XVII — Courts of Judicature Act, 1964, s. 50(2).

This was an appeal against conviction of the appellant on a charge of murder under section 302 of the Penal Code to which he had pleaded guilty. The appellant had stabbed to death a man who was attempting to rape the appellant's wife. The appellant was sentenced to 4 years imprisonment, despite evidence disclosing that the case fell within one of the general exceptions under the Penal Code. Since the appellant was precluded by section 50(2) of the Courts of Judicature Act 1964 from appealing except as to the extent of or legality of the sentence because of his plea, this appeal came before the Federal Court by way of an application for special leave to appeal out of time.